IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

WEDNESDAY, THE 7TH NOVEMBER 2007 / 16TH KARTHIKA 1929

FAO.No. 8 of 2006()

AGAINST THE ORDER DATED 23/06/2005 IN IA.1603/2003 IN OS.77/1999 of SUB COURT, KATTAPPANA

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APPELLANTS/PETITIONERS/3RD DEFENDANT & LEGAL HEIRS OF 2ND DEFENDANT.

1. RAFEEKA, AGED 30 YEARS,
   W/O. SHEIK FARIBULLAH, HOUSE NO.470,
   SEETHAKADI STREET, SAMPANDAPURAM, RAJAPALAYAM,
   VIRUDHUNAGAR DIST., TAMIL NADU, NOW IN THE ADDRESS
   HOUSE NO.6, SAKATHI GANAPATHI NAGAR, FIRST STREET,
   THIRUVATTIYUR, CHENNAI-19, TAMIL NADU.

2. VAJIHA NABEES, AGED 45 YEARS,
   W/O. LATE NABEES AHAMMED, NO.480,
   SEETHAKADI STREET, SAMPANDAPURAM, RAJAPALAYAM,
   VIRUDHUNAGAR DISTRICT, TAMIL NADU.

3. SAMEENA NABEES, AGED 18,
   D/O. LATE NABEES AHAMMED, NO.480,
   SEETHAKADI STREET, SAMPANDAPURAM,
   RAJAPALAYAM, VIRUDHUNAGAR DISTRICT,
   TAMIL NADU.

BY ADV. SRI.JOICE GEORGE

RESPONDENTS: PLAINTIFF & 1ST DEFENDANT

1. GEORGE @ SOJAN, S/O. MANUAL,
   CHILAMBIL HOUSE, SASTHANADA KARA,
   ANAVILASAM VILLAGE, UDUMBANCHOLA TALUK,
   IDUKKI DISTRICT.

2. THAMIM ANSARI, S/O. LATE SHAHUL HAMEED
   RAWTHER, HOUSE NO.254, SEETHAKADI STREET,
   SAMPANDAPURAM, RAJAPALAYAM TOWN, RAJAPALAYAM,
   VIRUDHUNAGAR DISTRICT, TAMIL NADU.

BY ADV. SRI.GEORGE THOMAS (MEVADA)

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 07/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.R.RAMAN & V.K.MOHANAN, JJ.

F.A.O.NO.8 OF 2006

Dated this the 7th day of November, 2007

JUDGMENT

Raman, J.

This is an appeal against the order dismissing the application filed under Order IX Rule 13 of the Code of Civil Procedure consequent upon the dismissal of the petition to condone the delay. The suit is one for specific performance of an agreement for sale of an estate, which is agreed to be sold for a total consideration of Rs.7 lakhs. According to the plaintiff, an amount of Rs.1,42,000/- was paid by way of advance. Thereafter also amounts were paid towards settlement of labour disputes of the employees of the defendants attached to the estate. First defendant was the co-owner of the property and also the power of attorney holder of defendants 2 and 3. Defendants filed separate written statements. The case was posted on 20/10/2000 on which day for non-appearance of the defendants they were declared ex parte and the suit was decreed on proof affidavit filed by the plaintiff. Later, defendants 2 and 3 filed an application under Order IX Rule 13 of the C.P.C. Since there was a delay of 1113 days

in filing the application, they also filed a separate petition seeking to condone the delay. In the affidavit filed in support of the application for condonation of delay, it was averred that the lst defendant, who was the power of attorney holder, was entrusted with matter for contesting the case. It is also averred that the 2nd defendant was actually laid up on the day on which the case was posted and subsequently he died and the other defendant is a Muslim lady. They thought that the lst defendant will contest the suit in all earnestness and they never knew about the default committed by the lst defendant. Actually, the lst defendant foiled the enquiries made by the petitioners and it was then that it arose suspicion in their minds and later on enquiry they came to know on 6/12/2003 that the suit was decreed ex parte due to the absence of the lst defendant. This was resisted by filing a counter by the respondent/plaintiff. In support of the petition seeking to set aside the ex part decree and to condone the delay, first appellant was examined as PW-1. There was no contra evidence adduced in the matter. The court below considered whether there is sufficient reason for condonation of delay. According to the court below, the lst defendant has executed the agreement and if the contentions of the defendants are true that the said agreement was executed with their

knowledge, how they could entrust the lst defendant to defend the case for specific performance. This being an inconsistent plea, it came to the conclusion that no reasons are made out for condonation of delay. Petition for condonation of delay in the circumstances, under which the delay occurred, arose for consideration. The plea raised by the appellants is that the lst defendant was entrusted to defend the matter for and on behalf of all the defendants; but he failed to do so. That is a matter to be considered while considering the suit on merits. But the lst defendant, who was absent, admittedly did not file any application to set aside the ex parte decree passed against all the defendants. This circumstances would show that the lst defendant was not interested in contesting the case. This supports the case of the appellants that the non-prosecution of the case by the lst defendant should not adversely affect their case being considered on merits and in order to prevent miscarriage of justice, an opportunity of being heard should be given to the parties.

2. In this connection, it has to be noticed that though the decree was passed as early as on 20/10/2000, for remitting the balance consideration 60 days' time was allowed and in the absence of any stay order passed by this Court and though more than several years have elapsed after passing

the decree, there is no acceptable evidence to show that the balance consideration was deposited before the court below. Though a specific ground is made by the appellants in ground (E) in this regard, there is no satisfactory explanation from the respondents as to why they did not deposit the balance consideration.

3. In the circumstances, we feel that the court below ought to have condoned the delay at least on terms, since the party normally seeks for adjudication of the dispute on merits. The subject matter of the litigation is 7 acres of cardamom estate. The plaintiff is continuing in possession of the same and therefore no prejudice as such will be caused by giving an opportunity to the appellants to contest the matter on merits. At the same time, we find that the delay is inordinate and the circumstances, under which they came to know about the decreeing of the suit as to whether they contacted the counsel in this regard and whether they got any information from him regarding the decreeing of the suit, are not satisfactorily explained in the affidavit.

4. In the circumstances, the proper course to be adopted is to allow this appeal on heavy terms. Accordingly, this appeal is allowed and the petition for condonation of delay (IA.1602/2003) and the petition for

setting aside the ex parte decree (I.A.No.1603/2003) will stand allowed and the suit stands restored to file on condition that the appellants jointly and severally shall pay an amount of Rs.11,000/- (Rupees eleven thousand) towards cost to be paid to the plaintiff, in the court below within a period of 45 days. On such payment the suit may be restored to file and the court below shall proceed with the matter, after affording an opportunity of being heard to both sides to adduce evidence in support of their respective contentions. However in case the amount as directed is not deposited within the time, the appeal will stand automatically dismissed.

P.R.RAMAN,
Judge.

V.K.MOHANAN,
Judge.

kcv.